Interest Arbitration as Alternative Dispute Resolution: The History from 1919 to 2011

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I. INTRODUCTION

This conference presents an excellent opportunity to discuss an important form of alternative dispute resolution: the use of what is called "interest arbitration"—a process described in detail below—to resolve bargaining impasses in public-sector labor relations. This process is used in many states as an alternative to strikes. While interest arbitration has been a crucial part of public-sector labor law and labor relations for decades, it has come under increased scrutiny in the past year. Indeed, in the wave of laws passed in 2011 restricting the rights of public-sector unions to bargain collectively,[1] interest arbitration was repeatedly attacked, and in several states it was eliminated or restricted.[2]

This paper gives a historical overview of the development of interest arbitration, discussing how and why it developed as it did. This development was neither inevitable nor "natural" in that many other western democracies generally allow public workers to strike.[3] But policymakers in the U.S. have a long tradition of deep antipathy to strikes by government employees. Even today, barely over a dozen states permit any public employees to strike.[4]

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[1] *See* Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L.J. 189, 203–12 (2012); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. OF LAB. & EMP. L. 149 (2012) for detailed descriptions of these new laws.

[2] *See infra* Section IV.

[3] County. Sanitation Dist. No. 2 v. Los Angeles Cnty. Emps. Ass'n, 38 Cal. 3d 564, 569, n. 8, 699 P.2d 835, 838, n.8 (1985) ("Interestingly, the United States is virtually alone among Western industrial nations in upholding a general prohibition of public employee strikes. Most European countries have permitted them, with certain limitations, for quite some time as has Canada.").

[4] By the year 2000, while thirty–eight states allowed at least some of their public employees to bargain collectively, only ten had statutes granting any public workers the

Thus, the question is: why did U.S. law and policy develop the way it did? This paper will trace the history through today, as 2011 saw new laws being passed that removed both strike rights and rights to interest arbitration.

I believe that in order to understand 2011, we must start with 1919. Thus, while this paper will trace developments up through the present, including debates on Ohio's Senate Bill 5(SB-5), it starts with a seminal event in the history of public-sector labor law that occurred almost a century ago: the Boston Police Strike. It shows that this event had a profound and lasting impact on how U.S. policymakers felt about dispute resolution in public-sector labor law. The paper then turns to the first public-sector labor law permitting collective bargaining—passed, ironically in view of recent events, in Wisconsin in 1959—and describes how concerns about dispute resolution were central to debates over that law. The paper continues by explaining how interest arbitration in public-sector labor relations has evolved and how it has worked from the 1960s into the 21st century. Finally, the paper explores the very recent developments in this area in the laws of 2011.

II. HISTORICAL DEVELOPMENT OF IMPASSE DISPUTE RESOLUTION IN PUBLIC-SECTOR LABOR RELATIONS

A. *The Boston Police Strike and Antipathy to Strikes by Public Employees*

1. *The Early History of Public-Sector Unions and the Boston Strike*

The Boston Police Strike of 1919 had a major influence on the development of public- sector labor law and labor relations in the U.S. The first lesson, to many, was that government employees should never be allowed to strike. Following from that, many argued, given that unions inevitably struck—for decades, there was no notion of any alternative dispute resolution procedure—government employees simply should not be allowed to organize into unions.[5] Thus, to understand what is happening today, we must begin with this event, and its effect on public-sector labor relations generally.

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right to strike under any circumstances; five other states allowed some public employees to strike under common law. RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 235 (Jack Rabin ed., 3d ed. 2001).

[5] I develop this thesis and discuss such attitudes in the first half of the twentieth century in detail in the first and third chapters of JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE (2004).

Public workers did not begin to get the formal legal right to bargain collectively or in most cases even the right to form unions until the 1960s. Not surprisingly, union density in the public sector was significantly lower before then. Still, some public workers organized unions as early as the 1830s.[6] Indeed, in the early years of the 20th century, public-sector unions were on the rise. A number of major public-sector unions were formed in the early 20th century. In 1906, the American Federation of Labor (AFL) created its first national union of government workers, the National Federation of Post Office Clerks. In 1902, the Chicago Teachers Federation had affiliated with the Chicago AFL. In 1916, the AFL formed the American Federation of Teachers (AFT). In the year before the Boston strike, the AFT grew from 2,000 to 11,000 members. In 1917, the AFL established the National Federation of Federal Employees. That same year, the National Association of Letter Carriers, founded in 1889, affiliated with the AFL, as did the Railway Mail Carriers. The AFL chartered its first firefighters local in 1903 and created the International Association of Fire Fighters (IAFF) in 1918. The IAFF soon grew from about 5,000 to more than 20,000 members.[7]

The unionization rate in the public sector reflected this activity. From 1900 to 1905, union density in the public sector was less than 2 percent, increasing to only around 3.5 percent in 1910. Then from 1915 to 1921, this density increased from 4.8 to 7.2 percent; in this same period, the total number of government employees in these years grew from 1,861,000 to 2,397,000. Thus, from 1915 to 1921, the total number of public workers in unions nearly doubled.[8] But the Boston Police Strike cut short this growth.

Significantly, the direct cause of the Boston strike was Boston Police Commissioner Edwin Curtis banning Boston police officers from joining a union affiliated with the AFL and suspending officers who refused to leave the affiliated union. The police officers had sought to be in such a union because of common complaints: low wages, long hours, and unhealthy working conditions.[9] Opponents of the unions cited, among other things, the problems with "divided loyalty" of police officers, specifically the idea that they would not be neutral in strikes by private sector unions affiliated with the AFL.[10]

The strike, which began on September 9, 1919, had disastrous consequences. For the three days, crime was rampant in Boston. State guards

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[6] *Id.* at 16–17.

[7] *Id.* at 18.

[8] *Id.*

[9] *Id.* at 25.

[10] *Id.* at 29–30.

finally intervened—firing into the crowds—killing nine and wounding twenty-three others. Hundreds more were injured during the strike. Property damage was estimated in the hundreds of thousands of dollars.[11] With peace finally restored, all 1,147 strikers were fired and never reinstated.[12]

The aftermath of the Boston strike significantly damaged public-sector unionism. All police locals affiliated with the AFL were soon destroyed, often because they were banned by local governments. While other public-sector unions tried to avoid association with the Boston disaster by emphasizing or adopting no-strike policies, many were still devastated. The IAFF lost fifty locals, including its Boston affiliate. The strike also led to losses in membership of the AFT and other public-sector unions. Overall, after years of increases, the rate of unionization in the public sector, which had bolted up rapidly in the preceding years, now stagnated below the 1921 rate of 7.2 percent through the rest of the 1920s.[13]

2. *The Lasting Impact of Boston Police Strike*

Moreover, for decades policymakers and judges associated all forms of public-sector unionism with the horror of the Boston strike. All unions of government employees affiliated with the AFL, and later with the CIO, renounced the strike weapon, and, from 1920 until the late 1960s, public-sector unions almost never struck.[14] Still, the image of strikes as the only method for settling disputes between public employers and unions was deeply ingrained.

This was especially true of judges. No state statutes gave public-sector unions any rights until 1959, so public-sector labor law up into the 1960s was essentially made by judges. And judges insisted that public-sector unions would resolve impasses just as private sector unions did—by striking.[15]

For example, in 1947, the Missouri Supreme Court, in *King v. Priest*[16] upheld a local government rule banning a local of the American Federation of State, County, and Municipal Employees (AFSCME) that more than eight

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[11] SLATER, *supra* note 5, at 14–27.

[12] *Id.* at 14.

[13] *Id.* at 36.

[14] *Id.* at 82.

[15] I discuss in more detail the cases in this section and related cases in *id.* at Chapter 3, and in Joseph E. Slater, *The Court Does* Not *Know "What a Labor Union is": How State Structures and Judicial (Mis)Constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981 (2000).

[16] King v. Priest, 357 Mo. 68, 88, 206 S.W.2d 547, 557 (1947).

hundred police officers had joined. The union's charter barred striking and bargaining and stated that the oath that police officers took regarding their duties came before any obligation to the union. Instead of tactics used in the private sector, the charter continued, the local would, "by publicity, direct public attention to conditions that need correcting . . . seek legislative action . . . represent individuals in administrative procedure, and prevent discriminatory and arbitrary practices."[17]

The Missouri Supreme Court rejected this argument: "[T]he court, of course, knows what a labor union is" it explained. The court took judicial notice of the "common knowledge" that "some of the most common methods used by labor unions . . . are strikes, threats to strike, [and] collective bargaining agreements . . . ."[18] Indeed, "all of the rights and powers ordinarily inherent in a labor union would exist actually or potentially" in the local, "regardless of the form of its charter and the present admissions of appellants."[19]

Similarly, *Congress of Industrial Organizations v. City of Dallas*[20] discounted the fact that the constitution and bylaws of the union in question renounced strikes "or other concerted economic weapons or procedures."[21] The court explained that the "declaration of the local to abandon the usual procedure pursued by labor unions to accomplish their purposes, is in irreconcilable conflict with the declared purposes and objects of the unions."[22]

Again, because judges saw no alternatives to strikes for public-sector unions, judges also opposed union organizing by government employees, often using very dramatic language to make their points. Two separate court decisions in the 1940s, one from Texas and the other New York, used the following quote: "To tolerate or recognize any combination of . . . employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded."[23]

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[17] *Id.* at 553.

[18] *Id.* at 554.

[19] *Id.*

[20] Cong. of Indus. Org. v. City of Dallas, 198 S.W.2d 143 (Tex. App. 1946).

[21] *Id.* at 148.

[22] *Id.*

[23] *Id.* at 145 (*quoting* Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (1943)).

B. *The First Public-Sector Labor Law in Wisconsin, and Developing Alternative Forms of Dispute Resolution in the Public Sector*

The first public-sector labor law was passed in Wisconsin in 1959, and then amended in 1962. Proponents of the law began attempting to pass such a law in 1951, and did so in every legislative session—which, at that time, was every other year—until they succeeded. The way in which bargaining impasse disputes would be resolved was a central issue in debates over the various bills. Proponents of the law had to overcome various traditional objections to public- sector unions, one of the most important of which was the threat of strikes, including but not limited to police strikes. The Wisconsin law for the first time was a realistic attempt to create alternative forms of dispute resolution for unions of government employees.[24]

In 1951, in Wisconsin, some locals of the AFSCME, a major public-sector union then and now, introduced a bill. The bill would have given Wisconsin public employees the right to organize unions and granted some limited quasi-bargaining rights (dubbed "collective considerations"). As an alternative to strikes, the bill provided that in cases of bargaining impasses, a state agency, the Wisconsin Employment Relations Board (WERB) would offer conciliation services.[25]

This was defeated, in large part due to fear of strikes by police and other government employees. Public employers opposed to the bill stressed the strike issue. In response, a clause was added to the bill stating explicitly that strikes were illegal, and proponents of the bill stressed that there had never been a strike of police or firefighters in Wisconsin, and that such unions barred strikes in their constitutions.[26]

This was not enough for opponents. For example, Oliver Grootemaat, President of the Village of Whitefish Bay wrote Wisconsin Governor Walter Kohler Jr., stating that the "mere elimination of one phrase could grant municipal employees the right to strike." Also, echoing opponents of the Boston police union, Grootemaat added that allowing police to organize "might place them in the anomalous position of being called upon to police a strike called by a brother union."[27] The Wisconsin League of Municipalities, a group of public employers, opposed the bill. Among other things, they explicitly cited the Boston police strike.[28] Governor Kohler vetoed the bill.[29]

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[24] I discuss the events in Wisconsin in more detail in SLATER, *supra* note 5 at Ch. 6.

[25] SLATER, *supra* note 5 at 170.

[26] *Id.* at 170–73.

[27] *Id.* at 172.

[28] *Id.* at 172–73.

AFSCME supported a similar bill in 1953. The bill was held up in committee, mostly on the strength of Republican votes.[30] In 1955, AFSCME tried again, this time with a bill that excluded police. But the Republican-controlled Senate rejected the bill. Proponents of the bill were only able to get an agreement that a Legislative Council would study the matter. Ultimately, the study suggested keeping the status quo: rejecting a call by some to ban public- sector unions, but giving no more rights to unions.[31] In 1957, a bill to give public-sector unions organizing and limited bargaining rights was tabled on a seventeen-fifteen vote, with all seventeen votes against the bill coming from Republicans.[32] In a quote that could have come from 2011, AFSCME blamed "this Chamber of Commerce dominated legislature."[33]

The political environment changed after the 1958 elections. For the first time in decades, Wisconsin elected a Democratic Governor, Gaylord Nelson, and a Democratic State Assembly. Nelson was friendly toward unions. He had even worked for a time representing AFSCME in Wisconsin.[34]

AFSCME introduced another bill in 1959. It again contained the right to organize. It specified that when bargaining reached impasse, WERB would have the power to mediate and conduct voluntary arbitrations. A lengthy struggle ensued, with a modified version of the bill becoming law.[35]

During debates on the bill, AFSCME stressed the need for tools such as arbitration and mediation to resolve disputes. "Any law which would prohibit strikes without providing other means of settlement is not fair. A union must have a way of getting its grievances and requests acted upon," AFSCME leaders argued.[36]

The fact that the bill was enacted into law showed the growing political clout of public- sector unions, and evolving attitudes toward them. But showing how difficult charting a new path for public-sector labor would be, the section authorizing the WERB to aid in bargaining impasses was dropped.[37]

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[29] *Id.* at 173.

[30] *Id.* at 173–74.

[31] SLATER, *supra* note 5, at 174–78.

[32] *Id.* at 178.

[33] *Id.*

[34] *Id.* at 179.

[35] *Id.* at 181.

[36] SLATER, *supra* note 5, at 181.

[37] *Id.* at 182–83.

Governor Nelson signed the bill into law on September 2, 1959. For the first time, most employees of county and municipal government in Wisconsin had a statutory right to organize and be represented by unions in negotiations over wages, hours, and working conditions. The law excluded public safety workers and state employees.[38]

The law led to many new agreements between AFSCME and other public-sector unions and local governments in Wisconsin. But it was still unclear what, exactly, should happen when bargaining came to an impasse, and AFSCME expressed dissatisfaction with the law in that regard.[39] At the same time, unions faced counterattacks. In 1960, the Republican candidate for governor, Philip Kuehn, called for a ban on public-sector bargaining and even on organizing. Echoing old arguments, Kuehn insisted that there could be no right to bargain with the government because there was no right to strike against the government.[40]

In a sense, both Kuehn and AFSCME were wrestling with the same issue, an issue that has existed in public-sector labor law from the first laws through today: what should happen in government employment when union bargaining reaches impasse? Kuehn believed that with no right to strike, bargaining was meaningless, so, why have a right to bargain? AFSCME was frustrated by a law that authorized "negotiations" but provided no method to resolve bargaining impasses and wanted more procedures to provide an alternative to strikes.[41]

Democrat Nelson won a second term as governor in 1960, although the Republicans retook the State Assembly and kept a majority in the Senate.[42] In 1961, AFSCME introduced a bill to amend the 1959 law such that at impasse, either party could ask the WERB for a fact-finder.[43] As discussed below, fact-finding is now common in public-sector labor laws, including Ohio's law. Typically, fact-finders find facts relevant to the bargaining impasse and offer recommendations.[44] Also, under the 1961 Wisconsin bill, WERB officials could act as mediators or arbitrators. Participation in arbitration would be voluntary, but decisions would be binding.[45]

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[38] *Id.* at 183.

[39] *Id.* at 184–85.

[40] *Id.* at 185.

[41] *Id.*at 185–86.

[42] SLATER, *supra* note 5, at 186.

[43] *Id.* at 186.

[44] *See infra*, Section III-B-2.

[45] SLATER, *supra* note 5, at 186.

The Bill was then amended to make arbitrations only advisory, not binding, and to allow fact-finding only when both parties—as opposed to either—wanted it. Thus, the law as enacted in January 1962 provided for WERB mediation if both parties requested it, and advisory fact-finding, if both parties requested it.[46]

In later years, the law was amended to provide for, among other things, binding interest arbitration to settle bargaining impasses. A separate statute was passed to give similar rights to employees of Wisconsin's state government. A later amendment even permitted strikes, albeit in very limited circumstances.[47] The Wisconsin law also sparked a national trend. By 1966, sixteen states had enacted laws granting some organizing and bargaining rights to at least some public employees.[48] By the year 2000, twenty-nine states and the District of Columbia allowed collective bargaining for all major groups of public employees; thirteen states allowed only one to four types of public workers to bargain (most commonly teachers and firefighters); and eight did not allow any public workers to bargain.[49]

Still, battles over the very idea of collective bargaining in government employment continued, most dramatically in 2011, but also in earlier years.[50] Specifically as to impasse resolution, even after unions began winning the rights to organize and bargain, the right to strike remained highly controversial and infrequently allowed.[51] None of the early public-sector labor statutes passed in the 1960s permitted strikes. By the year 2000, barely a dozen states allowed any public workers to strike (and some employees, such as police and fire, may not strike legally anywhere in the U.S.).[52] On the other hand, thirty-eight states provided some alternative procedures to resolve bargaining impasses: thirty-six states used mandatory or optional mediation; thirty-four used fact-finding; and thirty had arbitration as the final

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[46] The law now also covered police and fire, and explicitly provided for written contracts. *Id.* at 186–87.

[47] *See generally* William C. Houlihan, "*Interest Arbitration and Municipal Employee Bargaining: The Wisconsin Experience*," *in* COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 84 (Joyce M. Najita & James L. Stern, eds. 2001).

[48] SLATER, *supra* note 5, at 191.

[49] KEARNEY, *supra* note 4, at 60–61.

[50] *See* Malin, *The Legislative Upheaval in Public-Sector Labor Law*, *supra* note 1, at 149–53 ("Recent decades have seen major swings in the pendulum concerning public employee collective bargaining rights.").

[51] *See* MARTIN H. MALIN, ANN C. HODGES, & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 555–90 (2d ed. 2010).

[52] KEARNEY, *supra* note 4, at 236–37.

step.[53] Further, even the minority of states that permit some public employees to strike often allow strikes only after unions and employers have completed a number of mandatory alternative impasse resolution procedures, e.g., mediation and fact-finding.[54]

Arguments against allowing public-sector strikes remain influential. Harry Wellington and Ralph Winter, in their book The Unions and the Cities, argued that if public workers were allowed to strike, government officials would give in to union demands because strikes would burden the public and thus undermine the officials' chances for reelection.[55] Other traditional objections to public-sector strike rights include claims that such strikes threaten the provision of vital government services (some of which are essentially monopolies), undermine government sovereignty, give employees excessive bargaining power, and also that public employers often lack the ability to change conditions of work set by the legislature.[56] Also, the specter of the Boston police strike continues to play a role.[57]

C. *Non-Delegation and Arbitration*

With regard to alternative dispute resolution, one other issue from the "pre-collective bargaining" era before the 1960s is worth mentioning. Various courts in this era held that grievance arbitration and other aspects of collective bargaining in the public sector violated the constitutional non-delegation doctrine.[58] The basic principle of this somewhat obscure doctrine

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[53] *Id.* at 235–37, 264–65.

[54] *See* OHIO REV. CODE ANN. §4117.14 (West 2012) (requiring unions that are permitted to strike to go through, among other things, mediation and fact-finding before striking); *see generally* MALIN, HODGES & SLATER, *supra* note 51, 597–610.

[55] HARRY H. WELLINGTON & RALPH K. WINTER JR., THE UNIONS AND THE CITIES 29–32 (1971). Experience has shown that this is not always the case; indeed, public-sector strikes are often unpopular. Thus, the incentives for politicians often may not be what Wellington and Winter feared. *See* Craig A. Olson, "*Dispute Resolution in the Public Sector*," in PUBLIC SECTOR BARGAINING 162 (Benjamin Aaron, Joyce M. Najita & James L. Stern eds., 2d ed. 1988).

[56] *See* B.V.H. Schneider, "Public-Sector Labor Legislation—An Evolutionary Analysis," *supra*, 202; Kurt L. Hanslowe and John L. Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L.REV. 1055,1060–66 (1982).

[57] *See* NORMA M. RICCUCI, ET AL., PERSONNEL MANAGEMENT IN GOVERNMENT: POLITICS AND PROCESS, 477 (6th ed. 2007) (although "many years have elapsed" between the Boston police strike and the present, "the basic problems involved are essentially the same and remain without substantial resolution.").

[58] SLATER, *supra* note 5, at 77–81.

is that the government has certain powers that it may not constitutionally delegate to private bodies.[59]

Before the 1960s, courts often held that two types of union activities were improper delegations of power if they took place in the public sector. First, collective bargaining, because it delegated power over terms of employment to a private party, the union.[60] Second, and more relevant here, courts into the 1960s held that the non-delegation doctrine barred both interest arbitration and grievance arbitration in public-sector labor relations,[61] as it improperly gave private arbitrators power over non-delegable decisions regarding government employment.[62] Even today, while the vast majority of jurisdictions have rejected this approach, some courts have upheld anti-delegation objections to public-sector interest arbitration.[63]

III. MODERN LAW

A. *Legal Strikes as the Minority Approach*

The era from the 1960s to the present saw the development and maturation of a variety of mechanisms to resolve bargaining impasses in the public sector. Most jurisdictions use some combination of mediation, fact-finding, and binding interest arbitration.[64] Ohio allows many public employees to strike,[65] but, as note 2 mentions above, that is the minority approach.

Interestingly, it appears that effective collective bargaining laws tend to reduce the number of strikes by government employees—even when the law makes such strikes legal. In Ohio, as Professor Martin Malin has shown, making public-sector strikes legal actually greatly reduced the number of

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[59] *Id.*

[60] Note that this makes bargaining illegal even if the public employer agrees to bargain. SLATER, *supra* note 5, at 77 (citing Mugford v. Mayor of Baltimore, 44 A.2d 745 (Md. 1945) and Nutter v. City of Santa Monica, 74 Cal. App. 2d (1946)). See *id.* at 78–80, for a critique of these holdings.

[61] Grievance arbitration is the enforcement of terms of union contracts, generally by labor arbitrators. It has long been established in private-sector labor relations.

[62] *See* Karen Speiser, *Labor Arbitration in Public Agencies: An Unconstitutional Delegation of Power or the "Waking of a Sleeping Giant"?*, 1993 J. DISP. RESOL. 333, 337, 339–41 (1993).

[63] *See* Section III-B-4, *infra.*

[64] *See* MALIN, HODGES & SLATER, *supra* note 51, at 611–67.

[65] OHIO REV. CODE ANN. §4117.14(D)(2) (West 2012).

such strikes.[66] The Ohio public-sector labor law authorizing collective bargaining and strikes for most covered employees took effect on April 1, 1984, and after the law became effective, in the eight years from April 1, 1984 through April 30, 1992, there were 110 public-sector strikes in Ohio, seven of which were illegal.[67] In contrast, in the years before the law was passed, from 1974–1979 (a shorter time period), there was a total of 282 strikes, all illegal.[68] This effect continued in later years in Ohio, and has been seen elsewhere. From 1993–99, there were only fifty public-sector strikes in Ohio. From 2000–2010, there were only forty-three public-sector strikes.[69] More broadly, one study found that strikes were most likely to occur in states without a bargaining law and least likely to occur in states with a bargaining law that provided for binding arbitration.[70]

B. *Alternative Impasse Resolution Procedures*

1. *Overview and Mediation*

Still, only a minority of states permits public employees to strike and thus the majority of states relies on alternative dispute resolution processes. The main alternatives for dealing with bargaining impasses are mediation, fact-finding, or interest arbitration. In many jurisdictions, some or all of these procedures are mandatory when the parties are at impasse, and in many jurisdictions (although not all) interest arbitration results in a binding contract.[71] Even where some public employees may legally strike, they often must go through mediation or fact-finding before striking.[72]

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[66] Martin Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 361–65 (1993).

[67] *Id.*

[68] *Id.*

[69] Philip Stephens, "Benefits of Bargaining: How Public Sector Negotiations Improve Ohio Communities," POLICY MATTERS OHIO, 8 (Oct. 2011), http://www.policymattersohio.org/BenefitsofBargaining.htm.

[70] David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 2, 13–14 (Emp't Policy Research Network, Labor and Emp't Relations Ass'n Working Paper Series, 2011), http://ssrn.com/abstract=1792942.

[71] MALIN, HODGES & SLATER, PUBLIC SECTOR EMPLOYMENT, *supra* note 51, at 611–77.

[72] *Id.* at 597–601. *See, e.g.*, Ohio's statute, requiring both mediation and fact-finding before a union is permitted to strike. OHIO REV. CODE §4117.14.

Mediation involves a third party with no power to impose a contract meeting with the parties to try to work out a voluntary agreement. Mediators are sometimes private parties but more often come from state agencies. Approximately thirty-seven states use mediation for at least some public-sector impasses. In many jurisdictions, either party may invoke mediation; in some, both must request it; and in some, the state labor agency can trigger mediation on its own initiative.[73]

2. *Fact-Finding*

Thirty-three states use fact-finding for at least some public-sector impasses.[74] Fact-finding uses an outside, neutral party, who typically does an investigation, often including a hearing with formal presentations from both sides.[75] Fact-finders usually issue reports, which often include non-binding recommendations.[76] Also, fact-finder reports are often used as evidence in interest arbitrations.[77]

Public-sector labor statutes typically provide criteria for fact-finders to use when issuing their recommendations. For example, the Iowa Code provides:

> Section 20.22(9). Binding arbitration.
>
> The panel of arbitrators shall consider, in addition to any other relevant factors, the following factors:
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> a. Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.
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> b. Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.

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[73] KEARNEY, *supra* note 4, at 263–65. For a discussion of some mediation techniques, *see* Harold Newman, "*Mediation and Fact-Finding*" LABOR MANAGEMENT RELATIONS IN THE PUBLIC SECTOR: REDEFINING COLLECTIVE BARGAINING, 180–86 (John Bonner ed., 1999).

[74] KEARNEY, *supra* note 4, at 264–65.

[75] MALIN, HODGES & SLATER, PUBLIC SECTOR EMPLOYMENT, *supra*, note 51, at 614–15. *See generally* Newman, *supra* note 73.

[76] *Id.*

[77] *Id.*

> c. The interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services.
>
> d. The power of the public employer to levy taxes and appropriate funds for the conduct of its operations.[78]

Fact-finding can give the parties a more realistic assessment of their positions, or at least their chances of prevailing at arbitration. Also, making fact-finder reports public (which typically happens if the parties reject the fact-finder's recommendations) can bring additional pressure on one or both sides to be more reasonable.[79] On the other hand, fact-finding typically is not binding. Thus, it lacks finality, and on its own does not provide much leverage.[80]

3. *Interest Arbitration*

a. *Types of Arbitration*

Approximately thirty states use binding interest arbitration as the final step in public- sector impasse resolutions for at least some public employees. In this system a neutral arbitrator (sometimes a board of neutrals) holds a hearing, evaluates evidence, follows sometimes quite specific legal rules, and makes a binding decision as to what the terms of the collective bargaining agreement will be. The arbitrator may be a private party selected by the employer and union, or be appointed by the state agency. A typical interest arbitration hearing involves some witness testimony (for substantive and political reasons), but most of the evidence is usually documentary (e.g., information about the employer's budget and about the compensation of "comparable" employees).[81]

Significant variations exist within this type of process, however. First, in "conventional" interest arbitration, the arbitrator may pick among the offers of the parties, but the arbitrator may also come up with "compromise"

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[78] IOWA CODE ANN. § 20.22(9) (West 2010).

[79] For example, the Ohio statute provides that the fact-finder's report is private, unless and until the parties reject the fact-finder's recommendations and move on to further stages in the impasse resolution process. OHIO REV. CODE ANN. §4117.14(C)(6)(a) (West 2012). At that point, the fact-finder's decision is publicized. The point, of course, is to allow the parties to try to use political pressure to encourage a settlement.

[80] KEARNEY, *supra* note 4, at 272–73; Newman, *supra* note 75, at 189–190.

[81] KEARNEY, *supra* note 4, at 262, 264–65, 274–75.

solutions. So, for example, if the union proposal at impasse is $15 per hour and the employer's proposal is $13 per hour, the arbitrator could choose $13, $15, a number in between (e.g., $14), or, at least in theory, other numbers. An alternative approach is "final offer" arbitration, in which the arbitrator can only pick the final offer of one side or another.[82] "Final offer" arbitration, in turn, comes in two varieties: "issue-by-issue" and "total package."[83] In issue-by-issue arbitration, for each issue at impasse, the arbitrator must choose the final offer of one party or the other.[84] Suppose, for example, two issues were at impasse. First, wages: the union proposes $15 per hour, and the employer proposes $13 per hour. Second, a work rules issue: the union proposes that a certain task may only be done by two employees working together; the employer rejects that proposal entirely. In "issue by issue" final offer arbitration, the employer could choose the employer's offers on both issues, the union's offers on both issues, or the employer's offer on one issue and the union's offer on the other issue. In "total package" final offer arbitration, however, the arbitrator could choose only both the union's proposals or both the employer's proposals.[85]

Some states use different types of arbitration for different types of employees, or "mix and match" models, (e.g., final offer arbitration for economic issues but not for others).[86] Other variations exist. In Ohio (for employees not allowed to strike), the default is final offer issue-by- issue arbitration, but the parties can choose other alternatives, including but not limited to conventional arbitration and final offer total package arbitration.[87]

Arbitrators often express frustration with "final offer" rules, which may not be surprising since it limits their discretion. For example, in a fairly recent arbitration involving Helena, Montana and its firefighters' union, Arbitrator Jeffrey Jacobs opined:

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[82] *See* MALIN, HODGES & SLATER, *supra* note 14, 643–44; Arvid Anderson and Loren Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153 (1987).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Anderson & Krause, *supra* note 82, at 157–58 ("Michigan's police and firefighters statute, for example, provides for final offer arbitration on an issue-by-issue basis on economic issues and for conventional arbitration on non-economic issues . . . . New Jersey's law embodies yet another variation, requiring the arbitrator to choose either the employer's or the union's last offer as a total economic package, but allowing the arbitrator to resolve non-economic issues on a final offer, issue-by-issue basis. . . .").

[87] OHIO REV. CODE ANN. §§ 4117.14(C)(1), (D)(1), and (G)(7) (West 2012).

> This is a total offer final package arbitration. The arbitrator must therefore select either the City's or the Union's total package. This limitation makes it difficult on occasion to select between positions as there are many times when one party's position is reasonable and justifiable in one respect while in some others another party's position may well also have considerable merit. When that is the case, as here, there is a temptation to find a figure somewhere in the middle [of] the two respective positions that reflects the relative merits of both parties' arguments.
>
> With this type of interest arbitration however that option does not exist. The arbitrator must therefore select the most reasonable and justifiable position as a total package . . . . [A] total offer final package arbitration of this nature removes any power to modify or fine tune either side's position or to fashion an award that reflects the best of both arguments or conforms to the most appropriate evidence brought forth by either side. For better or worse, the arbitrator must select the least unreasonable option.[88]

On the other hand, a traditional argument against conventional arbitration is that it discourages realistic, hard bargaining because the parties expect the arbitrator to "split the baby"; thus, both sides have an incentive to cling to relatively extreme proposals.[89] Some studies conclude, however, that arbitrators do not simply split the difference in the most conventional interest arbitrations.[90]

One might ask here, what is the ultimate goal of this alternative dispute resolution mechanism? A Delaware case, distinguishing interest arbitration from grievance arbitration, explained:

> Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon consideration of policy, fairness and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their

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[88] City of Helena, Mont. v. Int'l Ass'n of Fire Fighters, Local 448, BOPA CASE # 5-2010 (407-2010, April 19, 2010).

[89] *See, e.g.*, Frederic Champlin and Mario Bognanno, *"Chilling" Under Arbitration and Mixed Strike-Arbitration Regimes*, 6 J. LAB. RES. 375, 376, 383–386 (1985); James Chelius and Marian Extejt, *The Narcotic Effect of Impasse-Resolution Procedures*, 38 INDUS. & LAB. REL. REV. 629, 630 (1985).

[90] *See, e.g.*, Henry Farber, *Splitting-the-Difference in Interest Arbitration*, 35 INDUS. & LAB. REL. REV. 70, 76 (1981).

> negotiations—they have left it to [the arbitrator] to determine what they should, by negotiation, have agreed upon.[91]

A Michigan case similarly stated that the role of interest arbitration is "to effect the settlement the parties would have reached if negotiations had continued when the parties are confronted with the realities of the situation," i.e. "to try to replicate the settlement the parties themselves would have reached had their negotiations been successful."[92]

These are interesting, if not entirely convincing, ideas. Of course the existence of impasse likely means the parties had a different view of what they "should have" agreed on and what a "successful" outcome would be. And how could one determine what settlement the parties "would have" reached without considering the pressures the particular impasse resolution mechanism would put on the parties during negotiation?

b. *Statutory Criteria Arbitrators Must Consider*

Statutes providing for interest arbitration also generally give the arbitrators criteria which they must consider. For example, Ohio's statute provides that interest arbitrators (and fact- finders) must consider the following:

> (a) Past collectively bargained agreements, if any, between the parties;
>
> (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
>
> (c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
>
> (d) The lawful authority of the public employer;

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[91] Del. State Troopers Ass'n v. State of Del., Dep't of Safety and Homeland Sec'y, Div. of Police, BIA 08-02-612 at 4252 (Del. Pub. Empl. Rel. Bd., June 1, 2009) (quoting FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS, 1358–59 (Alan Ruben ed., 6th ed. 2003)).

[92] City of Taylor v. The Command Officers' Ass'n of Mich., MERC Case No. D06C0326 at 5 (Jan. 30, 2008) (quoting Cnty. of Ottawa's Sheriff's Dep't v. Police Officers' Ass'n of Mich., MERC Case No. L96-H-6011 (1998)).

> (e) The stipulations of the parties;
>
> (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.[93]

The statutes of other states generally try to get at similar concerns. Montana Statutes provide:

> (5) In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:
>
> (a) comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services and with other services generally;
>
> (b) the interests and welfare of the public and the financial ability of the public employer to pay;
>
> (c) appropriate cost-of-living indices;
>
> (d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment.[94]

Statues typical list the criteria that interest arbitrators must consider, often using fairly detailed language, e.g., not just listing the employer's "ability to pay," but also specifying which types of comparable employees, cost of living numbers, and financial data from the employer the arbitrator should consider.[95]

Some statutes specifically instruct arbitrators to give certain criteria the most weight. For example, Oregon's statute states that the "first priority" is the "interest and welfare of the public."[96] The Oregon statute also gives comparatively specific guidance on determining who are "comparable" employees (an issue discussed in more detail in the following subsection):

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[93] OHIO REV. CODE ANN. §4117.14(G)(7) (West 2012).

[94] MONT. CODE ANN. § 39-34-103 (West 2009).

[95] KEARNEY, *supra* note 4 at 275.

[96] OR. REV. STAT. § 243.746 (West 2012).

Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and secondary priority to paragraphs (b) to (h) of this subsection as follows:

(a) The interest and welfare of the public.

(b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.

(c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.

(d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.

(e) Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in the situations described as follows:

(A) For any city with a population of more than 325,000, "comparable" includes comparison to out-of-state cities of the same or similar size;

(B) For counties with a population of more than 400,000, "comparable" includes comparison to out-of-state counties of the same or similar size; and

(C) For the State of Oregon, "comparable" includes comparison to other states. (f) The CPI-All Cities Index, commonly known as the cost of living.

(g) The stipulations of the parties.

(h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However,

> the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.[97]

The most important factors are, at least often, "comparable" employees and the ability of the employer to pay.

c. *"Comparables"*

Interest arbitrators consider two kinds of "comparables": external and internal. External comparables are employees of other public employers who do work that is the same or very similar to the work of the employees in the arbitration. For municipal employees, this usually means employees of other cities of a similar size, often within the same state. "Internal" comparables involve arguably similar employees of the same employer. This issue is often labeled "internal consistency." For example, in a police arbitration, arbitrators can look to wages, hours, and working conditions of firefighters in the same city, or employees of the police department who are not in the union bargaining unit. Some cases stress external comparables over internal comparables, while other cases stress internal comparables over external comparables.[98]

Because comparables are such a significant factor, many interest arbitrations spend a good deal of time debating which other employers and employees are proper comparisons. In a case arising in Michigan, the arbitration panel explained:

> Act 312 and the rules governing the Act do not prescribe specific factors the panel must consider when determining comparability. Generally, factors commonly considered include size of the community to be served, form of government, SEV and taxing authority, tax effort and other economic factors, scope of duties, the location of the comparable

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[97] OR. REV. STAT. § 243.746 (West 2012).

[98] *Compare, e.g.*, Vill. of Lisle, Illinois and Metropolitan Alliance of Police, FMCS No. 100511-02194-A (2011) (Arbitrator Ann Kenis stressing external comparables in selecting the Union's final offer), *with* Dakota County (Minnesota) and Teamsters Local No. 320,129 Lab. Arb. Rep. (BNA) 1285 (2011) (Arbitrator Jeffrey Jacobs stressing internal comparables in awarding the County employer's offer).

> communities as they relate to the local labor market and population demographics. . . .[99]

Also, even after determining which employees are comparable, the parties may still disagree on how exactly to compare, e.g., compensation.[100]

One goal of looking at "comparable" employees is to determine what the "market" is for certain types of public work. Another goal involves recruitment and retention. In *City of Helena*, the arbitrator warned of "some danger" if comparable jurisdictions gave significant wage increases to their comparable employees in 2010 and Helena did not. Helena's wages "will eventually fall too far behind if the City's proposal is awarded and that is a major concern." The potential danger was not abstract unfairness to Helena's employees. Rather, it was that Helena would be unable to recruit and retain good employees if nearby, comparable cities were paying noticeably higher wages for basically the same jobs.[101] For that reason, some arbitrators stress geographic proximity as an important factor in determining comparability. In a case arising in Washington state, Arbitrator Amedeo Greco noted that "[i]t may be interesting in the abstract to know what police officers make in Cheney; but what a Kelso officer could make by driving to Centralia or Battle Ground is much more personal data."[102]

Debates over comparables can be complicated. As noted above, Oregon's statute gives comparatively specific guidance on how comparables should be determined (mainly, cities in Oregon within specified population ranges). Still, one decision in an Oregon case devoted twenty-eight pages solely to the issue of which cities are comparable to Roseburg, Oregon regarding firefighters.[103]

d. *The Employer's Ability to Pay*

Most statutes require arbitrators to consider the employer's ability to pay. Not surprisingly, in interest arbitrations, employers rarely maintain they are

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[99] White Lake Towp. and Police Officers Labor Council, Mich. Emp. Rel. Comm., Case No. D06 G-1698 (2008).

[100] For example, in City of Helena, *supra*, the parties disagreed about whether to use mean or median average wages, and whether to use hourly as opposed to monthly wages.

[101] City of Helena, *supra* note 88.

[102] Fircrest Police Officers Guild and City of Fircrest, *WA*, PERC Case 21294-1-07-500 (2008) (Greco, Arb.).

[103] City of Roseburg, Oregon and Int'l Ass'n of Firefighters, Local 1110, Case No. IA-09-06 (2007) (Cavanaugh, Arb.).

affluent. But the recession that began in 2008 made this a central factor in interest arbitrations across the country. For example, in a case arising in Illinois, Arbitrator Edward Benn wrote the following:

> During the pendency of the arbitration proceedings . . . the economy went into free-fall. . . .
>
> First, on the initial day of hearing on August 5, 2008, the Dow Jones Industrial Average ("DJI") was at 11,616.14. On the second day of hearing on September 5, 2008, the DJI was at 11,221. . . . On January 26, 2009 — the trading day before the issuance of this award – the DJI stood at 8116, still 30% down from the commencement of these proceedings. . . .
>
> Second, contemporaneous with the dramatic fall in the stock market and since the close of the hearing on September 5, 2008, credit markets have frozen up, companies have gone out of business or cut back operations, massive layoffs have occurred and government bailouts of staggering proportions have been announced in an effort to get the economy moving. . . .
>
> As bad as the national unemployment rate is, the State's unemployment picture is worse. . . . These are the worst unemployment rates in Illinois since June 1993. . . .
>
> For the Union, the above described economic events could not have come at a worse time. . . . Section 14(h)(7) provides that interest arbitrators consider "[c]hanges in any of the foregoing circumstances during the pendency of the arbitration proceedings." Given the crash of the economy described above which occurred while this case was being presented, to say that "[c]hanges . . . during the pendency of the arbitration proceedings" occurred in this case would be an understatement.
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> Further, Section 14(h)(5) provides that cost-of-living be considered. Given the declining cost-of-living numbers, that factor does not favor the higher rank differential sought by the Union.[104]

Most arbitrators have taken a similar approach. A decision from Washington state explained, "in the current tough economic times the State's

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[104] State of Illinois, Dept. of Cent. Mgmt. Serv. and Int'l Brotherhood of Teamsters Local 726, Case Nos.: S-MA-08-262, Arb. Ref. 08.208 (2009) (Benn, Arb.).

ability to pay trumps all of the other statutory factors."[105] Similarly, in a case from Minnesota, Arbitrator Mario Bognanno wrote:

> Minnesota's general economic conditions have deteriorated sharply since CY 2007. For this reason, the wage and insurance terms that the instant parties might have voluntarily negotiated under the prevailing economic and fiscal regime most likely would have been different from those that were negotiated by comparable external bargaining units during better times—2007. Accordingly, the Arbitrator is not inclined to rely on the "dated" negotiated settlements of comparable external bargaining units—a conclusion that is strongly attenuated by the Employer's increasingly strained ability-to-pay.[106]

e. *The Significance of Precedent*

Interest arbitrators often take seriously past arbitration decisions involving the same or similar employees and past arbitral interpretations of statutory language. As to statutory language, in *City of Roseburg, Oregon*, Arbitrator Cavanaugh explained,

> I believe it promotes stability in public employee bargaining for an arbitrator to follow the decisions of prior arbitrators, and a party asking for a deviation from established interpretations of the law carries a heavy burden. That is so, in my view, even if I might have decided the issue differently as a matter of first impression. Not that slavish devotion to precedent is required. If I were convinced that my fellow arbitrators had utterly misread the statute, I might be willing to strike out on my own in a different direction now.[107]

Arbitrators also follow precedent when the issue involves a contract term that was interpreted in an earlier interest arbitration. For example, in *City of Alton, IL and IAFF Local 1255*,[108] the union asked for an expansion of a residency requirement, despite having lost on that same issue in a 2005 arbitration with a different arbitrator. Arbitrator John Fletcher rejected this, stressing the importance of precedent.

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[105] State of Washington and SEIU Local 775 NW (supplemental interest award) (2009) (Williams, Arb.).

[106] The Metro. Council, Metro Transit Police Dept. and Law Enforcement Labor Serv., Inc., Local 203 —Police Admin. & Command Employees, BMS Case No. 08-PN-1141 (2009) (Bognanno, Arb.).

[107] City of Roseburg, *supra* note 103.

[108] Ill. Lab. Rel. Bd. No. S-MA-006 (2007) (Fletcher, Arb.).

> [T]he Union's case . . . is a trip down memory lane. While this was not automatically fatal . . . the Union was nevertheless subject to a higher burden of proof in light of Arbitrator Meyers' conclusions a mere two years ago. . . . Arbitrator Meyers' award should be given deference equal to that of a negotiated status quo. . . . [P]utting the parties back to ground zero . . . would be tantamount to rendering the entire purpose of interest arbitration useless. . . . [It] would promote a practice of "arbitrator shopping" until the party petitioning for departure from the status quo was finally satisfied with the outcome, after which the "loser" could do the same. Clearly, this practice was never contemplated under the Act, given the final and binding nature of arbitration and statutory guidance as to how the arbitrator should reasonably (if not always absolutely perfectly) discern what the "natural extension of the bargaining process" should produce.

Indeed, most interest arbitration awards are closely linked to previous contracts between the parties. Barring changes in the law or significant changes in circumstances, arbitrators often require a significant quid pro quo for any substantial departure from previous contracts.[109]

4. *Impasse Procedures Without Mandatory, Binding Arbitration*

The principle behind mandatory, binding interest arbitration is that it is the quid pro quo for being denied the right to strike. For example, in *Snyder County Prison Board and County of Snyder v. Pennsylvania Labor Relations Board and Teamsters Local 764*, the court explained that

> "[b]ecause of the need to have prison guards on duty, the legislature has denied prison guards the right to strike. . . . The *quid pro quo* for such an arrangement is the provision of mandatory mediation and interest arbitration. . . ." The legislature intended "to balance the bargaining positions of public employers and public employees who are not permitted to strike."[110]

In a minority of jurisdictions, however, interest arbitrators issue opinions that are merely advisory rather than binding. The obvious criticism is that

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[109] This has prompted one commentator to suggest that the process "could probably be accomplished more inexpensively by averaging the parties' final offers and adding on some noise using a computer's random number generator." David E. Bloom, "*Arbitrator Behavior in Public Sector Wage Disputes*," *in* WHEN PUBLIC SECTOR WORKERS UNIONIZE, 123 (Freeman & Ichniowski eds., 1988).

[110] Snyder County Prison Bd. And County of Snyder v. Penn. Lab. Rel. Bd., 912 A.2d 356, 367 (Pa. Commw. Ct., 2006).

this sort of arbitration gives unions no more leverage than a fact-finder's recommendations: the employer still has final discretion. In another approach used by a few jurisdictions, both parties must agree to use a binding process. Also, a minority of states (e.g., Florida) which authorize collective bargaining but prohibit strikes simply have no step after mediation or fact-finding.[111] And some states have binding, mandatory arbitration for some public employees, but not others. For example, Michigan uses binding arbitration for certain public safety workers, but not for other public employees.[112]

Some jurisdictions lack binding interest arbitration because of non-delegation concerns. Again, before the 1960s, courts routinely held that grievance arbitration and indeed collective bargaining itself in the public sector violated constitutional nondelegation rules, but most jurisdictions later abandoned that approach. By the mid-1980s, courts in fourteen states had rejected claims that mandatory binding arbitration rules violated the nondelegation doctrine, and courts in only three states had held mandatory binding arbitration unconstitutional.[113] By the 1990s, sixteen states had rejected nondelegation claims.[114] Among other grounds, courts held that a public employer's rights are protected by its statutory right to appeal any arbitration award.[115] Still, five states had upheld such challenges: South Dakota, Colorado, Utah, Nebraska, and Maryland.[116] In some cases, courts struck down statutes because they failed to provide enough criteria for arbitrators to base awards.[117] The most recent case striking down binding interest arbitration on nondelegation grounds was *County of Riverside v. Superior Court.*[118] While important to public employees in California, this case relied on fairly specific language in the California state constitution, and it did not mark a shift in the majority approach.

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[111] *See* KEARNEY, *supra* note 4, at 273–74.

[112] *Compare* MICH. COMP. LAWS ANN. §§ 423.231-33 (West 2012) (compulsory and binding arbitration for police and fire employees) *and* MICH. COMP. LAWS ANN. §§ 423.271–87 (West 2012) (same for state police troopers and sergeants) *with* MICH. COMP. LAWS ANN. § 423.207–207(a) (West 2012) (mediation is the final step for all other public employees, and if mediation fails, the employer can implement its final offer).

[113] *See* Schneider, *supra* note 56, at 208 and nn. 69–70 (collecting cases).

[114] KEARNEY, *supra* note 4, at 279.

[115] *See, e.g.*, Office of Administration v. Penn. Lab. Rel. Bd., 528 Pa. 472, 479 (1991).

[116] KEARNEY, *supra* note 4, at 278.

[117] Rehmus, *Interest Arbitration* in BONNER, ED., *supra* note 73, at 198.

[118] Cnty. of Riverside v. Superior Court, 66 P.3d 718, 722 (Cal. 2003).

5. *Judicial Review of Interest Arbitration Decisions*

Public-sector labor statutes generally permit the parties to appeal the decisions of interest arbitrators to court. For example, a court may overturn an arbitrator's award if the arbitrator did not properly consider the factors that the relevant public-sector statute says the arbitrator must consider. What if an arbitrator sincerely believes a statutory factor is not applicable in a given case? Courts, and individual judges on courts, differ as to the extent to which arbitrators have to explain why they feel a factor is not applicable. For example, *In re Buffalo Professional Firefighters Ass'n, Inc., Local 282, IAFF*[119] featured a split on this issue. The majority reversed a lower court's decision that vacated an arbitration award. The lower court had held that the arbitrator gave inadequate consideration to various statutory factors. On appeal, the majority disagreed:

> Certainly, the Legislature could have chosen language that would require public arbitration panels to make express findings with respect to each of the statutory factors, or even each factor put in issue by the parties, but it did not. Thus, the Legislature has not required arbitration panels to engage in unnecessary discussion in their awards of factors not raised by the parties or thought to be relevant by either the parties or the panel. Judicial review of public arbitration awards otherwise would devolve into mere mechanical checklists, despite the fact that an award may appear on its face to be reasonable and to have a rational basis.[120]

The dissent, however, would have upheld the lower court:

> Civil Service Law §209 (4) (c) (v), the statute at issue herein, is clear and unambiguous. It provides that "the public arbitration panel shall make a just and reasonable determination *of the matters in dispute*. In arriving at such determination, the panel *shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following* ...
>
> In our view, the plain language of the statute requires an arbitration panel to do more than merely parrot that language by reporting in a conclusory fashion that it took into consideration the four enumerated factors. Indeed, the Legislature carefully crafted the language of the statute by stating that "the panel *shall* make a just and reasonable determination of the matters in dispute," thus rendering mandatory the arbitration panel's

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[119] In re Buffalo Prof'l Firefighters Ass'n, Inc., Local 282, N.Y.S.2d 744 (N.Y. App. Div., 2008).

[120] *Id.* at 749.

> consideration of the four enumerated factors, and compliance with the statute is lacking in the absence of specific discussion of those factors... .[121]

The competing policy concerns here involve, on the one hand, a desire that arbitration decisions at least normally be final, and the belief that arbitrators should not waste time discussing matters that are not germane to the case before them. On the other hand, public-sector interest arbitration is in some ways different from private-sector grievance arbitration, where courts are extremely deferential.[122] The public does have an interest in at least some terms of public-sector labor contracts, and public-sector labor statutes do direct arbitrators to consider certain factors.

Courts will also vacate interest arbitration awards if they violate other statutory requirements. Arbitrators cannot issue awards on matters not properly before them (e.g., issues not raised properly in the bargaining process or issues that are permissive or illegal topics of bargaining). Arbitrators must also follow rules designating the type of arbitration to be used. For example, *McFaul v. UAW Region 2*[123] vacated an arbitration award because the arbitrator "split the baby" instead of choosing the final offer of one side, as the default process in Ohio's statute required.[124]

IV. ATTACKS ON ALTERNATIVE DISPUTE PROCESSES IN THE 2011 LAWS

In 2011, around a dozen states passed laws limiting public-sector bargaining rights in various ways, including but not limited to eliminating the right entirely for some employees, greatly limiting the scope of bargaining, and mandating "right to work" rules (which make illegal any contractual agreement obligating members of a union bargaining union to pay their fair share of representation costs). I and others have discussed these changes in detail elsewhere.[125] This section focuses on changes that these new laws made to rules governing the resolution of bargaining impasses.

First, as mentioned above, Ohio law permits most public-sector employees to strike (after going through mediation and fact-finding); those

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[121] *Id.* at 750.

[122] See United Steelworkers of America v. Enterprise Wheel & Car. Corp., 363 U.S. 593 (1960) and its progeny.

[123] McFaul v. UAW Region 2, 719 N.E.2d 632 (Ohio Ct. App. 1998).

[124] The union's final offer was a 5 percent raise; the employer offered 3 percent, and the arbitrator ordered 4.2 percent. *Id.* at 633–35.

[125] For descriptions of these new laws, *see* Slater, *Public-Sector Labor in the Age of Obama*, *supra* note 1 at 203–12; Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, *supra* note 1 at 150.

who cannot strike (mostly, but not exclusively, police and fire employees) have a right to binding interest arbitration.[126] Ohio Bill SB-5, signed into law but later repealed by a voter referendum,[127] would have radically revised this processs.

Instead of the right to strike or the right to binding interest arbitration, under SB-5, when bargaining reached impasse, the parties would only have non-binding mediation and fact-finding available. If that did not produce an agreement—and the fact-finder's report could have been rejected by either a majority of the employer or a majority of the union—then the governing legislative body (often the employer itself) would have had the option of choosing the employer's final offer.[128] And even within the fact-finding process, SB-5 would have required that, in determining the employer's "ability to pay" (a statutory factor fact-finders had to consider under pre-existing law as well), the financial status of the public employer at the time of negotiations could be considered; future potential revenue increases from levies and bonds could not be considered.[129] Also, SB-5 would have added a rule that, for many employers (not the state or state universities), if the relevant legislative body selected the last best offer that cost more, and the CFO of the legislative body did not determine whether sufficient funds existed to cover the contract, the last best offers could have been submitted to the voters.[130] Finally, under pre-existing law, unions and employers could, through mutual agreement, choose alternative procedures to help resolve bargaining impasses. Under SB-5, unions and employers would not have had such options.[131]

In short, SB-5 would have created a form of "bargaining" in which one party (the employer) could have unilaterally chosen its own offer and the other party (the union) would have had no further recourse under the law. With neither binding interest arbitration nor the right to strike, unions would have had little to no leverage in negotiations, arguably ending their right to engage in truly meaningful and productive collective bargaining.

While SB-5 did not become law, other states actually did gut their impasse procedures. Under rules that had been in effect for decades before 2011, Wisconsin employees had broad rights to binding interest

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[126] OHIO REV. CODE ANN. §4117.14 (West 2012).

[127] *See generally*, Joseph Slater, *The Rise and Fall of SB-5 in Political and Historical Context*" 43 U. TOL. L. REV. 473 (2012).

[128] Ohio Senate Bill 5 (2011) amending OHIO REV. CODE §4117.14.

[129] *Id.*, amending § 4117.14(D)(2).

[130] *Id.*, amending OHIO REV. CODE §§ 4117.14(D)(2), 4117.141.

[131] OHIO REV. CODE § 4117.14(C) (West, 2012).

arbitration.[132] The "Budget Repair Bill," Wisconsin Act 10 (2011), §234, bars interest arbitration for all public employees Act 10 covers. Interestingly, this does not apply to certain public safety employees who are generally excluded from the new Act's provisions.[133] For the many employees Act 10 covers, the Act does not provide a specific replacement procedure to resolve bargaining impasses.[134]

Idaho enacted SB 1108, which limits collective bargaining by teachers. Section 22 of this law eliminated mandatory fact-finding. Now only mediation remains, and even this is limited. Under §20 of the new law, if the parties reach impasse in bargaining, they are permitted—but not required—to enter into mediation. Section 20 further provides that if the parties have not reached an agreement by June 10 of the year of the negotiations, the school board will unilaterally set the terms of employment for the coming school year.[135]

In Illinois, SB 7 amended the state's Educational Labor Relations Act to (among other things) place significant restrictions on the right of Chicago Public Schools employees to strike. Under §13(b)(2.10) of this law, for Chicago schools, if mediation fails to produce an agreement after a reasonable period of time, either party has a right to fact-finding. If this does not produce a settlement, the parties have up to fifteen days to accept or reject the fact-finder's recommendations. If the recommendations are rejected, then they are made public. The union cannot strike for until thirty days after the publication of the recommendations and even then cannot strike unless at least 75 percent of the bargaining unit authorizes the strike.[136]

In Nebraska, Legis. Bill 397 changed the state's interest arbitration rules to be more favorable to public employers. Notably, in Nebraska, interest arbitration is performed by the Commission of Industrial Relations (CIR) rather than by private arbitrators. The new Nebraska law provides detailed, and more restrictive (and employer-friendly) criteria for selecting the group of "comparable" communities for interest arbitrations. Also, it mandates that if the employer pays compensation between 98 and 102 percent of the average of the comparables, then the CIR must leave compensation as it is. If the employer's compensation is below 98 percent of the average, then the

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[132] Houlihan, *supra* note 47 at 69.

[133] Wisconsin Educ. Ass'n Council v. Walker, 824 F.Supp.2d 856 (W.D. 2012) (Discussing this exclusion).

[134] Malin, *The Legislative Upheaval in Public-Sector Labor Law*, *supra* note 1 at 160.

[135] S.B. 1108 §§ 20, 22, 61st Leg. (Idaho 2011).

[136] S.B. 7, 97th Gen. Assemb. (Ill. 2011).

CIR must order it raised to 98 percent, and if it is above 102 percent, the CIR must order it lowered to 102 percent. The targets are reduced to 95–100 percent during periods of recession (defined as two consecutive quarters in which the state's net sales and use taxes, and individual and corporate income tax receipts, are below those of the prior year).[137]

In late December 2010, New Jersey adopted New Jersey Laws 2010, ch. 105. This law capped wage increases at 2 percent for New Jersey police and firefighter arbitration awards for contracts expiring between Jan. 1, 2011 and April 1, 2014. This cap on base salaries expires on April 1, 2014.[138]

Further, this law placed serious restrictions on interest arbitrators. Arbitrators will now be randomly selected (as opposed to the previous process of mutual selection); arbitrator compensation is limited to $1,000 per day and $7,500 per case; arbitrators must issue awards within forty-five days of a request for interest arbitration (prior law allowed 120 days); and arbitrators will be penalized $1,000 per day for failing to issue an award. Also, the arbitrator's award may be appealed to the state public employment agency, the Public Employment Relations Commission (PERC), and PERC must decide the appeal within 30 days.[139]

Tennessee, in the Professional Educators Collaborative Conferencing Act of 2011,[140] repealed the Educational Professional Negotiations Act, a 1974 law which had authorized collective bargaining for public school teachers and had featured conventional interest arbitration. Under the new Act, teachers are now permitted only "collaborative conferencing": the employer will meet with any group that receives support from at least 15 percent of the relevant employees.[141] Further, §49-5-609(d) of the Act states that the parties are not required to reach agreement on any of these issues, and adds that if no agreement is reached, the school board will set terms and conditions of employment through school board policy.

V. CONCLUSION

Interest arbitration, although not without its flaws and critics, has generally operated as a fair and reasonable alternative mechanism for resolving bargaining impasses. For example, historically, for firefighter and

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[137] L.B. 397, 102d Leg. (Neb. 2011).

[138] 2010 N.J. Laws ch. 105.

[139] 2010 N.J. Laws ch. 105; *see* Malin, *The Legislative Upheaval in Public-Sector Law*, *supra* note 1 at 161–62.

[140] TENN. PUB. CH. NO. 378.

[141] *Id.* at §§ 49-5-605(b)(1), (2) & (4).

police union negotiations in Ohio that have reached impasse and required arbitration, arbitrators have sided with management about half the time and unions the other half. Further, the system works by encouraging the parties to resolve their differences short of arbitration. Only about 2 percent of all negotiations among those employees in Ohio have gone to arbitration since 1983, and that is likely at least in large part due to the fact that the existence of this mechanism creates incentives for both sides to be serious and realistic in negotiations.[142] Also, studies show that using binding arbitration to resolve impasses significantly lowers the probability of strikes.[143]

My co-author, Marty Malin, will be arguing in these pages that some types of interest arbitration are better than others, and that allowing strikes may sometimes be preferable to interest arbitration.[144] My points are perhaps more obvious: interest arbitration, as described above and as practiced in the real world, is much better than what came before it in the period up to the mid-1960s, and interest arbitration is preferable to the alternatives offered in the 2011 laws.

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[142] Philip Stephens, "Benefits of Bargaining: How Public Sector Negotiations Improve Ohio Communities," Policy Matters Ohio (Oct. 2011), http://www.policymattersohio.org/BenefitsofBargaining.htm.

[143] Rehmus, *supra* note 73, at 202; Olson, *Dispute Resolution in the Public Sector*, in AARON, NAJITA & STERN, *supra* note 55, at 165; KEARNEY, *supra* note 4, at 277 (collecting sources); *see also* Thomas Kochan, David Lipsky, Mary Newhart, & Alan Benson, *The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 569 (2010) (study of effect of mandatory, binding arbitration on police and fire employees shows that as to the "primary purpose... to avoid work stoppages by essential public service employees, the arbitration statute has clearly met its objectives: no police or firefighter unit has engaged in a strike" in the thirty years the study covers).

[144] Martin Malin, *Two Models of Interest Arbitration*, 28 OHIO ST. J. ON DISP. RESOL. 145 (2012).